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OCT 29 1982
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982

No. 82-148

JAMES R. SNYDER COMPANY, INC., EBELING AND HICKS, INC., CLARENCE GLEESON, INC., and LEO J. VANDERVENNET AND SONS, INC.,

Petitioners,

v.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BARTON-MALOW CO., DARIN & ARMSTRONG, INC., R.E. DAILEY & CO., THOMAS E. DAILEY, A.Z. SHIMINA & SONS CO., DETROIT BUILDING EMPLOYERS LABOR COUNCIL, STANLEY E. VEIGHEY, JOHN W. LANZETTA, FRANK D'AGOSTINA and JOHN McCOY,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM M. SAXTON
MARK T. NELSON
Butzel Long Gust Klein & Van Zile
1881 First National Building
Detroit, Michigan 48226
Counsel for Respondents

North American Graphics, Inc., 1020 W. Lafayette, Detroit, Michigan 48216 313-962-0979

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In The
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JAMES R. SNYDER COMPANY, INC., et al.,

Petitioners,

v.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition For Writ Of Certiorari seeking review of the Sixth Circuit Court of Appeals decision in this case because there are no special or important reasons for granting certiorari according to the considerations governing review on certiorari as set forth in Rule 17 of the rules of this Court.

DECISIONS BELOW

Petitioners commenced this action in the United States District Court for the Eastern District of Michigan, Southern Division, on March 26, 1970, claiming that Respondents violated Section 1 of the Sherman Act, 15 U.S.C. §1 by allegedly entering into an agreement with certain building trades unions to impose a collectively bargained wage scale on Petitioners with intent to drive Petitioners out of business.

Summary judgment was granted as to certain named defendants prior to trial and was affirmed on appeal. *Snyder, et al.* v. *Edward Rose and Sons, et al.*, 546 F.2d 206 (6th Cir. 1976).

Trial commenced before a jury on October 3, 1979. At the conclusion of plaintiffs' proofs the District Court granted Respondents' motion for directed verdict on the grounds that there was insufficient evidence on which reasonable minds could deliberate and find for petitioners (Appendix B hereto). Petitioners appealed to the Sixth Circuit Court of Appeals and the Sixth Circuit affirmed the decision of the District Court. *James R. Snyder Company, Inc., et al.* v. *Associated General Contractors of America, et al.*, 677 F.2d 1111 (6th Cir. 1982), Appendix A hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on April 29, 1982. The Petition For Certiorari herein was filed within ninety (90) days thereof. Jurisdiction of this Court is asserted under 28 U.S.C. §1254(a).

QUESTIONS PRESENTED

The questions presented by the Petition For Certiorari are as follows:

1. Whether the courts below erred in holding that under the Federal Rules of Evidence out-of-court statements of alleged co-conspirators would be admissible to prove the existence of an unlawful conspiracy only if, in ruling on the admissibility of the evidence, the trial court finds that a conspiracy is established by a preponderance of the evidence; and
2. Whether in a case where a union seeks to impose a collectively bargained wage scale on one group of employers, allegedly pursuant to an agreement with another group of employers, proof of anti-competitive purpose (i.e., predatory intent) is required to establish an antitrust violation.

STATUTES INVOLVED

Section 1 of the Sherman Act:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. §1.

Section 4 of the Clayton Act:

> "Any perron who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found to have an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney fee." 15 U.S.C. §15.

STATEMENT OF THE CASE

This is an anti-trust action grounded on an alleged violation of Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. §1. Essentially, Petitioners claim that Respondents entered into a collective bargaining agreement with certain construction trade unions in 1970, covering wage rates and fringe benefits, and that Respondents conspired with certain unions to impose the same wage rates and fringe benefits upon Petitioners for the purpose of forcing Petitioners and the class they represent out of business (J.A. 22A, 29A).[1] Respondents deny entering into any conspiracy with anyone to impose any wage rates and fringe benefits upon Petitioners and the class they represent (J.A. 33A-44A, 1469A, B-1579A - B-1581A). Respondents contend that the unions engaged in collective bargaining

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[1] Because of Petitioners' failure to set forth the material facts with unswerving accuracy, Respondents feel constrained to include herein a counterstatement of the facts. "J.A." citations are to the Joint Appendix filed in the Sixth Circuit Court of Appeals. Citations to Appendix A and Appendix B refer to the Appendix hereto.

with Petitioners' collective bargaining representative and acted unilaterally and without agreement with Respondents in seeking the same wages and fringe benefits from Petitioners as the unions had negotiated with Respondents. At the close of Petitioners' proofs, the District Court granted Respondents' Motion For Directed Verdict on the grounds that Petitioners had failed to present evidence on which reasonable minds could deliberate and find a conspiracy (J.A. 71A).

Petitioners commenced this action by filing of their initial Complaint on March 26, 1970 (J.A. 2A). The case proceeded to trial on Petitioners' Amended Complaint filed on August 6, 1970 (J.A. 22A). Petitioners, and the class they represent, are masonry contractors in the building construction industry (J.A. 23A). Respondents are contractors, and contractors' trade associations, engaged in general building construction (J.A. 35A-37A).

The Amended Complaint alleges that on February 16, 1970, Respondents, in the course of multi-employer/multi-union collective bargaining, agreed with the unions upon a wage and fringe benefits package amounting to $2.00 for two years (J.A. 28A-29A). Petitioners claim that Respondents then conspired with the Laborers and Bricklayers Unions to have said Unions impose the same wage and fringe benefit settlement upon Petitioners and the class they represent (J.A. 29A).

Trial commenced before a jury on October 3, 1979. Petitioners called three witnesses to testify and introduced portions of the deposition testimony of another witness. The witnesses called to testify were James Snyder (J.A. 739A-1105A) and Robert Ebeling (J.A. B-1582A - C-1589A), who are principals of two of the Petitioner companies, and Thomas Dailey (J.A. 1105A-1470A), one of the Respondents. Petitioners also introduced portions of the deposition testimony of Stanley Veighey (J.A. 1478A - B-1581A), one of the individual Respondents.

Neither witness Snyder nor witness Ebeling was involved in the multi-trade collective bargaining involving Respondents and the various construction trades unions. Subsequent to the multi-trade settlement on February 17, 1970, however, Petitioners entered into collective bargaining, through their collective bargaining representative the Detroit Mason Contractors Association ("DMCA"), with the Laborers and Bricklayers Unions (J.A. 881A-883A). Petitioners attempted to establish the claimed conspiracy by pure surmise and speculation and by Snyder and Ebeling offering nebulous hearsay statements assertedly made by representatives of the Laborers and Bricklayers Unions in the course of collective bargaining with the DMCA (J.A. 883A, 891A, 1075A, C-1576A - C-1578A, C-1582A).

The District Court, over Respondents' objection, received the hearsay testimony of Snyder and Ebeling relative to statements allegedly made by the non-party Union representatives. In conformity with the procedure laid down by the Sixth Circuit Court of Appeals in *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980), *reh. denied*, 445 U.S. 972 (1980), the District Court conditionally admitted such statements subject to later demonstration of their admissibility.

At the close of Petitioners' proofs, Respondents moved to strike the hearsay statements of the alleged non-party co-conspirators. The District Court considered all of the evidence, *including the hearsay statements*, in deciding the preliminary question of admissibility (Appendix A, page 19a, n. 13, 677 F.2d at 1117 n. 13). The court concluded that Petitioners had failed to establish Respondents' participation in the alleged conspiracy "by even the slightest preponderance" of the evidence and thus held the alleged co-conspirator hearsay statements inadmissible. (Appendix B, page 36a.)

The court then concluded that, with the exclusion of the alleged co-conspirator hearsay statements, there was insuffi-

cient evidence on which reasonable minds could deliberate and find for Petitioners and granted Respondents' Motion For Directed Verdict (J.A. 71A, 1602A, 1605A).

PRE-1970 COLLECTIVE BARGAINING HISTORY

Beginning with the mid-1950's, the Detroit area building construction industry had been continuously beset by crippling labor strikes (J.A. 1170A). The construction unions' "leapfrogging" approach to collective bargaining resulted in the various trade unions taking the settlement of one union and seeking to better that settlement in subsequent negotiations (J.A. 1095A, 1111A, 1113A). In 1968 the Detroit construction industry was hit with a 10-week strike as a result of failure to reach accord with the various building trades unions (J.A. 822A, 1110A, 1510A). Ultimately, the AGC agreed to a two year settlement providing an aggregate increase of $1.90 per hour (J.A. 1689A-1690A).

THE EVOLUTION OF MULTI-TRADE BARGAINING

The record of collective bargaining in the Detroit area construction industry showed that for upwards of 50 years, and despite numerous strikes, there was no instance in which the unions had agreed to settle for a lesser amount than their demand prior to a strike (J.A. 1175A). Thus, it was clear to many employers that there had to be a better way to conduct the collective bargaining so as to eliminate the need of a strike (J.A. 1175A, 1365A, 1374A-1375A, 1509A-1510A).

The AGC representatives discussed the concept of multi-employer/multi-union collective bargaining with people from other areas of the country who had experience with this format (J.A. 1505A-1507A). The CEC also appointed a ten man committee to explore a better way to conduct collective bargaining (J.A. 1247A, 1253A).

Representatives of the CEC and the AGC met with the Executive-Secretary of the Greater Detroit Building Trades Council in the Spring of 1969 and broached the subject of multi-trade bargaining (J.A. 1246A-1247A, 1375A). In October

1969, the AGC met with those construction trades unions with which it bargained to discuss the concept of multi-trade bargaining (J.A. 1248A-1267A, 1611A-1614A). In November, 1969, a meeting was held with a number of trade unions and construction contractor associations to discuss multi-trade bargaining (J.A. 1268A-1269A, 1536A-1537A). A representative of the DMCA, Petitioners' collective bargaining agent, attended this meeting (J.A. 1269A). Subsequent meetings between the associations affiliated with the CEC and with the various trade unions were held (J.A. 1277A, 1619A) to discuss multi-trade bargaining; and finally, on February 6, 1970, those construction contractor associations and those trade unions who were agreeable to participating in multi-employer/multi-union bargaining agreed to commence multi-trade negotiations, limited to monetary issues only, on February 16, 1970 (J.A. 1304A-1310A, 1629A).

THE 1970 MULTI-TRADE COLLECTIVE BARGAINING

On February 16, 1970, those contractor associations and those building trades unions who had voluntarily agreed to participate in multi-trade bargaining met (J.A. A-1568A). The collective bargaining was limited to a singular matter, the monetary issue, i.e., wage rates and fringe benefit costs (J.A. 1154A, 1159A, 1379A, 1629A). Approximately 16 building trades unions and 24 contractor associations were represented in the multi-trade bargaining (J.A. 1172A, 1187A).

There were a number of carry-over[2] labor contract rates within and without the Detroit area providing $1.00 per hour increases, or more, effective in 1970 (J.A. 1150A, 1164A-1165A, A-1576A - A-1577A). The $1.00 per hour pattern was "set in concrete" (J.A. 1164A) and Mr. Dailey, Chairman of the CEC negotiating committee, was convinced in his own mind that the contractors were going to end up paying a dollar-dollar in 1970 for a two year agreement (J.A. 1199A).

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[2] A carry-over rate refers to a wage rate previously negotiated in a multi-year contract which rate was to take effect in 1970.

It was therefore not surprising that the unions' monetary demand presented in the February 16th multi-trade bargaining was a dollar-dollar for the two year agreement. What was unusual was that the unions presented their real settlement number "right out of the box" (J.A. 1176A, 1177A). After some 14-16 hours of marathon bargaining, the parties agreed on a *proposed* two year agreement providing for monetary (wages and fringe benefits) increases of $.90 per hour effective June 1, 1970, $.15 per hour effective October 1, 1970, and $.95 per hour effective June 1, 1971 (J.A. 849A, 1154A-1155A, A-1585A, 1176A-1177A, 1670A). The contractor negotiators were convinced that this was the best settlement they could make[3] (J.A. 1168A, 1176A, 1178A, 1180A, 1199A, 1341A, 1383A, 1586A).

This proposed agreement was not binding, however, on anyone (J.A. 1183A). Each participating contractor association and each union could either accept or reject the proposed agreement through ratification procedures for its own members (J.A. 1155A, 1359A). The proposed agreement applied only to those contractor associations and unions participating in the multi-trade bargaining (J.A. 1213A, 1222A, 1229A, B-1579A - B-1581A).

The proposed agreement was significant in that the unions agreed not to strike in the event of impasse on bargaining working conditions with the individual contractor associations, but to submit such disputes to binding arbitration (J.A. 845A-850A, 1640A-1641A).

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[3] Petitioners assert the "Respondents discussed how the Agreement would 'hurt' Petitioners and others" (Petition For Writ Of Certiorari, page 5). As noted by the Sixth Circuit, the record in fact shows that "[R]ather, Mr. Vehighey said that defendants discussed the other employers because they did *not* want to hurt those employers by the wage pattern which might be set" (Appendix A, page 27a; 677 F.2d at 1125).

THE DMCA'S COLLECTIVE BARGAINING WITH LABORERS AND BRICKLAYERS IN 1970 AFTER THE MULTI-TRADE BARGAINING

James Snyder, Chairman of the DMCA labor negotiating committee, learned of the multi-trade settlement on February 17, 1970, while he was in Chicago (J.A. 839A). This action was commenced shortly thereafter on March 26, 1970 (J.A. 2A).

In 1970 the DMCA acted as the collective bargaining agent for those masonry contractors who were members of the DMCA, among which were Petitioners (J.A. 803A-804A, 807A, 1685A). The DMCA negotiated collective bargaining agreements only with the Laborers and Bricklayers Unions, the principal crafts employed by its member contractors (J.A. 779A, 805A, 807A). The Laborers and Bricklayers also negotiated collective bargaining agreements with various contractor associations who participated in the multi-trade bargaining, and these unions thus participated with said contractor associations in the multi-trade bargaining (J.A. 1640A-1641A). The DMCA had been invited to participate in the multi-trade bargaining but declined the invitation (J.A. 1262A).

The proposed agreement reached on February 17, 1970, in the multi-trade bargaining was not binding on the DMCA (J.A. 1213A, 1222A, 1229A, B-1579A - B-1581A). The DMCA thus entered into collective bargaining negotiations with the Laborers and Bricklayers in May and June of 1970, some sixty (60) days after the multi-trade bargaining (J.A. 868A). The Bricklayers Union proposed the same monetary settlement it made with the contractor associations participating in the multi-trade bargaining (J.A. 878A-879A). Witness Snyder testified that the Bricklayers Union representative stated that "there was no way possible that they [the Union] could change from the agreement they made with the multi-bargaining group" and that "they [the Union] couldn't accept any more or any less" (J.A. 880A). The DMCA ultimately settled

with the Bricklayers Union for the same monetary settlement which the Bricklayers received in the multi-trade bargaining (J.A. 882A).

The Laborers Union presented the DMCA with a monetary demand of $2.00 for two years (J.A. 883A). Snyder testified that Willie Carter, one of the Laborers Union negotiators, stated that "he made his agreement with the General Contractors . . . and that is the way it was going to be" (J.A. 883A). Snyder also testified that Mr. Gionatti, another Laborers Union negotiator, "made it very clear with me he made an agreement with AGC and would not go back on it" (J.A. 891A).

The Laborers Union and the DMCA reached an impasse in their negotiations and a three week strike ensued (J.A. 883A-884A). The DMCA and the Laborers ultimately settled for a three year contract with an aggregate monetary increase of $3.15 per hour (J.A. 884A).

On May 25, 1970, Thomas Dailey, President of the CEC, sent a telegram to the Secretary of the Detroit Building Trades Council requesting a meeting for May 27th with the negotiating committees for the parties to the multi-trade agreement, stating "subject is the recent settlement of a contract between Detroit Mason Contractors Association and Laborers Local 334, Local 1076" (J.A. 1420A-1421A). No such meeting, however, took place (J.A. 1435A). Dailey testified that he sent the telegram because the DMCA settlement could establish a carry-over pattern for 1972-1973 (the multi-trade agreement expired on June 1, 1972) and he wanted to determine whether this would have any effect on those unions who had not yet acted to ratify the multi-trade settlement with those contractor associations participating in the multi-trade bargaining (J.A. 1426A-1427A, 1431A-1432A, 1438A).

REASONS FOR DENYING THE WRIT

There is here present no special and important reason for review of the Sixth Circuit's decision measured against the considerations governing review on certiorari as set forth in

Rule 17 of the rules of this Court. The Sixth Circuit affirmed the judgment of the District Court on two (2) alternate, independent grounds. Firstly, that Petitioners failed to produce sufficient evidence of a conspiracy to violate the anti-trust laws on which reasonable minds could deliberate and find for the Petitioners. Secondly, that Petitioners failed to produce sufficient evidence of any anti-competitive purpose to harm Petitioners' businesses. As stated by the Sixth Circuit, the "evidence consisted almost entirely of actions which are permitted under the nation's labor laws". Appendix A, page 1a; 677 F.2d at 1112.

Petitioners seek to portray this case as one of precedential significance. It is clearly not such a case. The District Court and the Sixth Circuit Court of Appeals simply applied established legal principles to an undisputed factual record in disposing of a twelve year old case which had no basis in fact.

I.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE DISTRICT COURT CORRECTLY APPLIED THE FEDERAL RULES OF EVIDENCE IN DETERMINING THE ADMISSIBILITY OF HEARSAY STATEMENTS ATTRIBUTED TO ALLEGED CO-CONSPIRATORS.

In support of their contention that Respondents entered into an agreement with the unions to impose the wage scale negotiated with Respondents upon the Petitioners, the Petitioners sought to put into evidence two hearsay statements assertedly made to Petitioners' collective bargaining representative by union representatives. Respondents made timely objection to the admission of such statements. The District Court, however, conditionally admitted the statements in evidence. At the close of Petitioners' proofs Respondents made a motion to strike the alleged co-conspirator out-of-court statements on the grounds that such statements were inadmissible because Petitioners had failed to establish the existence of a conspiracy by a preponderance of the evidence as required by the Sixth Circuit's holdings in *United States* v.

Enright, 579 F.2d 980 (6th Cir. 1978), and *United States* v. *Vinson, supra.*

The District Court considered the totality of the evidence, *including the hearsay co-conspirator statements*, and determined that the evidence was insufficient to establish the existence of the alleged conspiracy "by even the slightest preponderance". Accordingly, the District Court ruled that the co-conspirator hearsay statements were inadmissible and granted Respondents' motion to strike.[4] After striking the hearsay co-conspirator statements, the District Court concluded that there was insufficient evidence on which reasonable minds could deliberate and find a conspiracy and granted Respondents' motion for directed verdict (Appendix B, pages 36a).

Petitioners contend that in deciding the preliminary issue as to the existence of a conspiracy, in ruling on the admissibility of hearsay co-conspirator statements, the trial court should apply a "prima facie" evidence standard rather than a "preponderance of the evidence" standard. Petitioners' argument in this regard is unsupported by any citation of authority or by sound reasoning.

Prior to adoption of the Federal Rules of Evidence (effective July 1, 1975), the general rule was that co-conspirator hearsay testimony was admissible to prove the existence of a conspiracy *if* the trial court determined there was sufficient *independent, non-hearsay* evidence to establish a prima facie case of conspiracy.[5] *United States* v. *Nixon*, 418 U.S. 683, 701,

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[4] Petitioners have not contended that the District Court's factual determination was clearly erroneous. Appendix A, page 19a, n. 13; 677 F.2d at 1121 n. 13.

[5] Significantly, a return to the prima facie evidence standard and proof of the existence of a conspiracy by independent, non-hearsay evidence, as a condition for admitting hearsay statements, would avail Petitioners nothing in this case. The District Court found that the independent, non-hearsay evidence of conspiracy was insufficient to withstand a motion for directed verdict (Appendix B, pages 33a); and Petitioners make no claim that such finding is clearly erroneous. Appendix A, page 19a, n. 13; 677 F.2d at 1121, n. 13.

n. 14 (1974); *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977); *South-East Coal Company* v. *Consolidation Coal Company*, 434 F.2d 767,788 (6th Cir. 1970); *United States* v. *Enright, supra*, 579 F.2d at 983.

Section 801(d)(2)(E) of the Federal Rules of Evidence provides that a statement is not hearsay *if* made "by a co-conspirator of a party during the course and in the furtherance of the conspiracy". The plain language of the rule imports that establishment of the existence of a conspiracy is a condition prerequisite to admitting the co-conspirator statement. Rule 104(a) of the Federal Rules of Evidence provides that preliminary questions concerning "the admissibility of evidence shall be determined by the court". Thus, the trial court must determine whether there is sufficient evidence to establish the existence of a conspiracy as part and parcel of the determination of the admissibility of the out-of-court co-conspirator statement.

In *United States* v. *Enright, supra*, the Sixth Circuit addressed the impact of the Federal Rules of Evidence on the issue of admission into evidence of out-of-court co-conspirator statements to prove the existence of a conspiracy. The court concluded that the obligation of the trial court to determine preliminary questions of admissibility of evidence and considerations of basic reliability and fairness, imposes a greater duty upon the trial court than simply to satisfy itself that a prima facie case of existence of a conspiracy exists. The Sixth Circuit stated that it aligned itself with the holding and logic of the First Circuit in *United States* v. *Petrozziello, supra*, 548 F.2d 20, that even in a criminal case the ordinary civil standard (i.e., preponderance of the evidence) should be applied in determining the existence of a conspiracy as a condition of admitting out-of-court co-conspirator statements.

Subsequent to its decision in *Enright, supra*, the Sixth Circuit ruled in *United States* v. *Vinson, supra*, 606 F.2d 149, that under Rule 104(a), Federal Rules of Evidence, the trial court

may consider out-of-court co-conspirator statements to establish the existence of a conspiracy in deciding the preliminary question of admissibility. Under this extremely liberal holding, hearsay co-conspirator statements may lift themselves by their own bootstraps to the level of competent evidence. *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); Appendix A, page 12a, n. 8, 677 F.2d at 1117, n. 8.[6]

Petitioners argue that the plaintiff in a civil case should not be held to the same standard for determination of the admissibility of out-of-court co-conspirator statements as applies in a criminal case (i.e., proof of existence of a conspiracy by a preponderance of the evidence) under *United States* v. *Enright*, *supra*. Such argument is unsupported by any citation of judicial or other authority, or by reason. Apparently the argument is premised on the false notion that the rationale for applying the preponderance of the evidence test in *Enright* is simply that the trial court should not be held to the same standard in determining the preliminary question of admissibility as is a jury in determining guilt or liability. As stated by the Sixth Circuit, however, in this case —

> "... *Enright* was based upon this court's construction of the Federal Rules of Evidence rather than upon notions of criminal law or procedure. Except as constitutional considerations or statutes otherwise require, *the same rules apply to civil and criminal cases*. See Fed. R. Evid. 1101(b)." Appendix A, page 11a; 677 F.2d at 1117. Emphasis added.

Petitioners' argument that differing standards should be applied in criminal and civil cases for determining preliminary questions of the admissibility of evidence flies in the face of the clear mandate of the Federal Rules of Evidence, 1101(b).

Applying the preponderance of the evidence test to the preliminary determination of the existence of a conspiracy does

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[6] Most Circuit Courts of Appeals permit the trial court to only consider evidence of the existence of a conspiracy independent of the out-of-court co-conspirator statements. 1 Weinstein's *Evidence*, ¶ 104[05], pp. 164-45, 164-46, n. 30.

not, as contended by Petitioners, usurp the fact-finding function of the jury. The Sixth Circuit's explanation of the fallacy in such contention leaves nothing to be said:

> "It is argued that a preponderance of the evidence test usurps the function of the jury to determine whether a conspiracy exists. This has surface appeal until it is remembered that *what is involved here is a ruling on the admission or exclusion of particular evidence, and on this question only.* As with all such judicial decisions on admissibility, the effect upon the outcome may be profound, but this comes from the ruling itself and not from the manner in which the law requires the trial judge to make it." Appendix A, page 11a-12a; 677 F.2d at 1117. Emphasis added.

The holding of the Sixth Circuit, that the out-of-court statements of the alleged co-conspirators would be admissible to prove the existence of an unlawful conspiracy only if, as a preliminary matter, the District Court found a conspiracy by a preponderance of the evidence, is in accord with the Federal Rules of Evidence and well settled law.

II.

THE HOLDING OF THE SIXTH CIRCUIT COURT OF APPEALS, THAT ANTI-COMPETITIVE PURPOSE (i.e., PREDATORY INTENT) IS NECESSARY TO ESTABLISH AN ANTI-TRUST VIOLATION ARISING FROM AN ALLEGED AGREEMENT BETWEEN A UNION AND EMPLOYERS TO ESTABLISH AN INDUSTRY-WIDE WAGE SCALE, IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS.

In the Amended Complaint filed in this cause the Petitioners alleged that Respondents had violated Section 1 of the Sherman Act, 15 U.S.C. §1, by combining and conspiring with certain labor unions, as follows:

> "... Agreed that the terms of the multi-trade bargaining agreement herein set forth and, more particularly, the wage and fringe benefit provisions should be imposed upon the Plaintiffs herein, *with the purpose and intent of forcing the Plaintiffs and the class they represent out of business.*" Paragraph 11A of Amended Complaint.[7] Emphasis added.

In his opening statement to the jury, counsel for the Petitioners stated that —

> "[Mr. Cohen] However, we will also show that when that agreement was made, the AGC and the general contractors knew what they were doing would be ruinous to our business, that they, the AGC and the general contractors, intended it to be ruinous to our business and that, in fact, they did have what is referred to as a predatory [purpose] that at least one of the purposes was hurting the members of our association." Transcript of Hearing, October 9, 1979.

At the conclusion of the Petitioners' proofs the District Court concluded that the evidence failed to demonstrate "any intent on anyone's part to harm" the Petitioners in their business (Appendix B, page 33a). Accordingly, the District Court stated that it would not have let the case go to the jury on the matter of intent to harm Petitioners in their business (Appendix B, page 34a).

The Sixth Circuit Court of Appeals, in affirming the District Court, held —

> "... that plaintiffs in the present case had the burden of proving first that defendants and unions agreed to impose wages upon plaintiffs, and second that defendants entered into the agreement with the intent to injure the plaintiffs' businesses, i.e., with predatory intent." Appendix A, page 18a; 677 F.2d at 1121.

[7] See also Appendix A hereto, pages 2a, 12a; 677 F.2d at 1113 and 1118.

Having failed to present evidence to support their allegations that Respondents agreed with the unions to impose their negotiated wage agreement upon Petitioners with predatory intent, Petitioners now erroneously claim that proof of predatory intent is not here required to establish a violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

Petitioners' assertion that the holding of the Sixth Circuit Court of Appeals, requiring proof of predatory intent in the circumstances of this case, is in conflict with the decision of the Third Circuit Court of Appeals in *Muko, Inc.* v. *Southwestern Pennsylvania Building And Construction Trades Council*, 670 F.2d 421 (3rd Cir. 1982), *petition for cert. filed*, _____ U.S. _____, 50 U.S.L.W. 3804 (No. 81-1798, Mar. 26, 1982), is patently feckless.

In *Muko, supra*, a restaurant owner entered into an agreement with building trades unions to use union represented contractors to build its restaurants in order to cause the unions to cease picketing its restaurant. Muko, a non-union contractor, claimed that the agreement was a group boycott and a *per se* violation of the Sherman Act. The trial court rejected Muko's contention that the agreement between the restaurant owner and the unions gave rise to a *per se* violation of the Sherman Act and instructed the jury to apply the rule of reason. The jury found that although the agreement was outside the labor exemption to the anti-trust laws, it was not an unreasonable restraint of trade and the trial court entered judgment for the defendants.

On appeal Muko claimed that the trial court erred in failing to instruct the jury to apply the *per se* standard for determining an anti-trust violation and in instructing the jury on the relevant product market. The Third Circuit rejected both contentions and affirmed the District Court. The court stated that there was no evidence of anti-competitive purpose in that the defendants did not wish "to gain an advantage over Muko in

an *economic* or *competitive* sense" and held that the *per se* rule of unreasonableness was not applicable. *Muko, supra,* 670 F.2d at 432.

The *Muko* case, *supra,* is inapposite to the instant case on its face and there is plainly no conflict between the holding of the Third Circuit in that case and the holding of the Sixth Circuit in the instant case. In fact, the two decisions are in complete harmony in their rejection of the notion that the *per se* rule of unreasonableness should be applied in every labor anti-trust case in which the labor exemption is found inapplicable.

The Third Circuit stated, as follows:

> "... We thus cannot agree with Muko, who contends that every labor anti-trust case in which the labor exemption is found to be inapplicable should be held illegal under the *per se* standard." *Muko, supra,* 670 F.2d at 426.

Petitioners' contention that the holding of the Sixth Circuit in this case is in conflict with the legal posture of the Third Circuit in similar cases is completely refuted by even a cursory reading of *Consolidated Express, Inc.* v. *New York Shipping Association,* 602 F.2d 494, 515-516 (3rd Cir. 1979), *reversed and remanded on other grounds,* 448 U.S. 902 (1980). In *Consolidated Express, supra,* the Third Circuit stated that where anti-trust liability is asserted with reference to an agreement concerning subjects at the very heart of the collective bargaining process, as is the situation in the instant case, liability is limited "to cases where predatory intent can be shown",[8] according to the teachings of this Court's decision in *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965). The Third Circuit, moreover, expressly noted its agreement with the Sixth Circuit's construction of this Court's holding in *Pennington* that proof of predatory intent is

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[8] *Consolidated Express, supra,* 602 F.2d at 516.

required to establish an anti-trust violation on facts such as are here involved.[9]

Petitioners' assertion that the holding of the Sixth Circuit requiring proof of predatory intent in the case *sub judice* is in conflict with the decisions of this Court in *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302 (1971), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), is likewise erroneous.

In *Pennington*, the Court addressed the issue of whether an alleged agreement between a union and a group of employers to impose a collectively bargained wage agreement on employers outside the bargaining unit, with intent to drive the latter out of business, violated the Sherman Act. In deciding the case the Court divided into three groups, each composed of three Justices. Mr. Justice White wrote the Court's opinion and Mr. Justice Douglas wrote a concurring opinion (Mr. Justice Black and Mr. Justice Clark concurring), giving the construction of Mr. Justice's White's opinion. Mr. Justice Goldberg, with whom Mr. Justice Harlan and Mr. Justice Stewart joined, dissented from the opinion.

In construing the Court's opinion, Mr. Justice Douglas formulated the issue in the case to be submitted by instruction at retrial, stating:

> "... On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay *and if it was made for the purpose of forcing some employers out of business*, the union as well as the employers who participated in the arrangement with the union should be found to have violated the anti-trust laws." *Pennington, supra*, 381 U.S. at 672-673. Emphasis added.

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[9] *Ibid.*

As noted in *Smitty Baker Coal Co. v. United Mine Workers of America*, 620 F.2d 416, 428 (4th Cir. 1980) cert. denied 449 U.S. 870 (1980):

> "Mr. Justice Douglas' construction of Mr. Justice White's opinion and his statement of the circumstances under which an antitrust violation against the Union could be found has been considered a proper summarization of the decision of the court in *Pennington*..."[10]

On remand of *Pennington, supra*, 381 U.S. 657, the Sixth Circuit concluded that this Court's holding required proof of anti-competitive purpose (i.e., predatory intent) to establish an anti-trust violation involving an alleged agreement to impose a negotiated wage scale on non-bargaining unit employers. *Lewis* v. *Pennington (Pennington II)*, 400 F.2d 806, 814 (6th Cir. 1968), *cert. denied*, 393 U.S. 983 (1968), *rehearing denied*, 393 U.S. 1045 (1969). As noted by Judge Edwards in *Ramsey* v. *United Mine Workers of America*, 416 F.2d 655, 661 (6th Cir. 1969), *reversed and remanded on other grounds*, 401 U.S. 302 (1971), this Court's denial of certiorari in *Pennington II, supra*, 400 F.2d 806, cannot be discounted. The Court remanded *Pennington, supra*, with instructions for retrial. If the trial court, or the Sixth Circuit, had incorrectly construed this Court's holding in *Pennington, supra*, as requiring proof of predatory intent, it is difficult to believe the Court would have ignored the error and denied certiorari in *Pennington II, supra*.

In *Ramsey* v. *United Mine Workers of America*, 416 F.2d 655 (6th Cir. 1969), *(en banc), reversed and remanded on other grounds*, 401 U.S. 302 (1971), the Sixth Circuit reaffirmed its construction of this Court's holding in *Pennington, supra*, 381 U.S. 657 (1965), that proof of predatory intent is required to establish an anti-trust violation founded on an alleged agreement to impose a negotiated wage scale on employers out-

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[10] *See, Smitty Baker Coal Company, supra*, 320 F.2d at 428, n. 33, and 433, n. 46.

side the bargaining unit.[11] The Sixth Circuit, however, divided evenly on whether the elements of the asserted anti-trust violation had to be established by "clear proof" or by a "preponderance of the evidence". This Court granted certiorari and held that the "preponderance of the evidence" standard should be applied in determining whether the union had committed an anti-trust violation. *Ramsey* v. *United Mine Workers of America, supra,* 401 U.S. 302 (1971). The Court expressly declined to reconsider its holding in *Pennington, supra,* 381 U.S. 657, and did not indicate that the Sixth Circuit's constuction of *Pennington,* relative to the requirement for proof of predatory intent, was in error.

The holding of the Sixth Circuit that, in the circumstances here present, proof of predatory intent is necessary to establish an anti-trust violation, is in complete accord with the decisions of this Court and of every Court of Appeals having occasion to address the issue. Petitioners' tortured misconstruction of the decisions of this Court, and of the Third Circuit, to suit their own purpose does not provide appropriate grounds for granting certiorari.

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[11] 416 F.2d at 655, 673.

CONCLUSION

This case is one in which the Petitioners simply failed to produce evidence sufficient to establish an alleged conspiracy in violation of the anti-trust laws. There is here presented no conflict with the decision of another Court of Appeals on the same matter, no important question of federal law which should be settled by this Court, and no conflict with applicable decisions of this Court. The Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

WILLIAM M. SAXTON
MARK T. NELSON
Butzel Long Gust Klein & Van Zile
1881 First National Building
Detroit, Michigan 48226
Counsel for Respondents

Dated: October 20, 1982.